

No. _____

In the
Supreme Court of the United States

Bo Jack Kelley,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether facts that affect the minimum or maximum reasonable federal sentence must be proven to a jury beyond a reasonable doubt?

PARTIES TO THE PROCEEDING

Petitioner is Bo Jack Kelley, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bo Jack Kelley seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals is reported at *United States v. Kelley*, 858 Fed. Appx. 159 (5th Cir. September 10, 2021)(unpublished). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on September 10, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have

compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 3553(a) of Title 18 provides:

(a) Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A)

to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B)

to afford adequate deterrence to criminal conduct;

(C)

to protect the public from further crimes of the defendant; and

(D)

to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3)

the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i)

issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii)

that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B)

in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or

policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A)

issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B)

that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(6)

the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7)

the need to provide restitution to any victims of the offense.

STATEMENT OF THE CASE

A. Trial Proceedings

Petitioner Bo Jack Kelley pleaded guilty to one count of causing a minor to produce a visual depiction of sexually explicit conduct under 18 U.S.C. §2251(a). *See* (Record in the Court of Appeals at 44-49). A Presentence Report (PSR) found a Guideline range of 360 months imprisonment, owing to enhancements for distribution of child pornography, an offense involving a sexual act and conduct named in 18 U.S.C. §2241, the use of an interactive computer service, and a pattern of unlawful sexual activity involving minors. *See* (Record in the Court of Appeals at 156-157). None of these facts appeared in the indictment. *See* (Record in the Court of Appeals at 9). At sentencing, the court adopted the PSR and imposed the statutory maximum sentence of 360 months. *See* (Record in the Court of Appeals at 123, 133).

B. Court of Appeals

Petitioner appealed, contending on plain error review that the jury trial and reasonable doubt guarantees of the Fifth and Sixth Amendments preclude judicial determination of facts that affect the maximum or minimum reasonable punishment by a preponderance of the evidence. The court of appeals rejected the claim as foreclosed by circuit precedent. *See* [Appendix A].

REASONS FOR GRANTING THE PETITION

This Court should rectify the widespread deprivation of constitutional rights occasioned by judicial fact-finding of facts that affect the maximum or minimum reasonable sentence.

Other than the fact of a prior conviction, any fact that increases the defendant's maximum punishment must be found by a jury beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The same rule applies to facts that increase the minimum punishment. *See Alleyne v. United States*, 570 U.S. 99, 102 (2013). In *United States v. Booker*, 543 U.S. 220 (2005), this Court found that any federal sentence must be a reasonable application of 18 U.S.C. §3553(a) in light of the facts proven to the sentencing court. A sentence that is not reasonable in light of these factors must be reversed. *See Booker*, 543 U.S. at 259-264. Further, a sentencing court may be reversed if its findings of facts are clearly erroneous. *See Gall v. United States*, 552 U.S. 38, 50 (2007).

It follows from this that any fact affecting the maximum or minimum reasonable punishment in a case must be found by a jury beyond a reasonable doubt. The court below, however, held that only those facts altering a mandatory range of punishment established by statute constitute elements of the offense, subject to the jury trial and reasonable doubt guarantees. *See United States v. Bazemore*, 839 F.3d 379, 393 (5th Cir. 2016). That is clearly wrong. *Booker* rejects any limitation of *Apprendi* to statutory maximums – the maximums at issue in *Booker* arose from Guidelines promulgated by an independent agency, not statutes. *See Booker*, 543 U.S.

237-238 (“In our judgment the fact that the Guidelines were promulgated by the Sentencing Commission, rather than Congress, lacks constitutional significance. In order to impose the defendants' sentences under the Guidelines, the judges in these cases were required to find an additional fact...”). As such, it is clear that any maximum or minimum punishment triggers the *Apprendi* guarantee.

This Court should accept certiorari to rectify the deprivation of constitutional rights flowing from this misunderstanding of *Apprendi*. The present case does not involve preserved error, and accordingly may not be an ideal vehicle. In the event that it does grant certiorari to resolve this issue, however, it should hold the instant case, and grant certiorari, vacate the judgment below, and remand for further proceedings in light of the outcome. *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

The present case likely involves constitutional error. Here, the trial judge found many facts that altered the maximum and minimum reasonable sentence even though they had not been placed in the indictment, nor proven to a jury beyond a reasonable doubt. These included: the defendant's distribution of child pornography, the age of the victim, the existence of a “Sexual act” and conduct violating 18 U.S.C. §2241, and a pattern of sexual offenses against minors. *See* (Record in the Court of Appeals at 9, 126, 156-157). Because those findings affects the extent of punishment and deterrence necessary in the case, they are essential to any reasonable application of 18 U.S.C. § 3553(a). They should have been placed in the indictment, and Petitioner should have been offered a chance to contest them to a jury under the reasonable doubt standard.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 9th day of December, 2021.

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